ELECTRONICALLY FILED MAR 13, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. STEPHEN ROBERT JONAS, Defendant-Appellant.	)	S.CT. NO. 15-1560

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE PAUL D. SCOTT, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED FEBRUARY 22, 2017

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CERTIFICATE OF SERVICE

On March 13, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Stephen Robert Jonas, No. 6873223, Fort Dodge Correctional Facility, 1550 L St., Fort Dodge, IA 50501.

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QUESTION PRESENTED FOR REVIEW

During voir dire, trial counsel moved to strike for cause a juror based on the juror's inability to be fair and unbiased toward the defendant. After minimal rehabilitative efforts, the district court determined the juror could be impartial and denied trial counsel's motions to strike for cause. Did the district court err in denying the strikes, and as a result, was Iowa Rule of Criminal Procedure 2.18(9) violated when Royer was forced to use a peremptory strike for a juror that should have been struck for cause, requiring reversal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

STATEMENT IN SUPPORT OF FURTHER REVIEW

The district court erred in overruling trial counsel's for-cause challenge to juror Stagner. This Court should overrule State v. Neuendorf and hold that prejudice is presumed when trial counsel is forced to exercise a peremptory strike on a juror who should have been struck for cause.

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant, Stephen Robert Jonas, appeals his conviction and judgment following a jury trial resulting in a guilty verdict for Murder in the Second Degree in violation of Iowa Code sections 707.1 and 707.3 (2013).

Course of Proceedings: On September 30, 2014, the State filed a trial information charging defendant with the offense of Murder in the First Degree, a class A felony, in violation of Iowa Code sections 707.1, 707.2(1) and 707.2(2) (2013). (Trial Information) (App. pp. 4-5).

On March 11, 2015, defendant filed a Notice of Defenses indicating that he will rely on the affirmative defenses of Justification. (Notice of Self Defense) (App. p. 6).

Jury trial commenced on July 2, 2015. (Cover). The jury found defendant guilty of the lesser included offense of Murder in the Second Degree. (Verdict Forms) (App. pp. 20-22).

Sentencing hearing commenced September 9, 2015. (Sentencing Order) (App. pp. 29-31). On the charge of Murder in the Second Degree, the court ordered defendant to serve an indeterminate term of imprisonment not to exceed fifty years and a mandatory minimum sentence of seventy percent before becoming eligible for parole pursuant to section 902.12. (Sentencing Order) (App. pp. 29-31). The court also ordered to pay restitution to the victim's estate in the amount of $150,000 pursuant to section 901.3B. (Sentencing Order) (App. pp. 29-31).

Defendant filed Notice of Appeal on September 15, 2015. (Notice of Appeal) (App. p. 32).

Facts: Stephen Robert Jonas was convicted of murder in the second degree. (Verdict Forms)(App. pp. 20-22).

The facts presented through the trial testimony are not germane to the issue raised in this application for further review as the issue raised concerns the procedure for selecting a jury.

ARGUMENT

I. During voir dire, trial counsel moved to strike for cause a juror based on the juror's inability to be fair and unbiased toward the defendant. After minimal rehabilitative efforts, the district court determined the jurors could be impartial and denied trial counsel's motions to strike for cause. Did the district court err in denying the strikes, and as a result, was Iowa Rule of Criminal Procedure 2.18(9) violated when Royer was forced to use a peremptory strike for jurors that should have been struck for cause, requiring reversal?

A. Error Preservation

To preserve error of a district court's ruling on for-cause challenges to prospective jurors, trial counsel must challenge the juror and articulate the specific grounds for the challenge, and the district court must rule on the challenge. See State v. Tillman, 514 N.W.2d 105, 108 (Iowa 1994). Error was preserved by defendant's motion to strike for cause. (Tr. p. 153 Line 10 – p. 162 Line 9).

B. Standard of Review

Appellate courts review a district court's ruling on for-cause challenges to prospective jurors for abuse of discretion. Tillman, 514 N.W.2d at 107. Appellate courts

"give broad discretion to the [district] court in its ruling on such challenges." State v. Mitchell, 573 N.W.2d 239, 239–40 (Iowa 1997).

C. Discussion

During voir dire, trial counsel challenged for cause a potential juror on the grounds that the juror could not be fair and impartial toward the defendant. (Tr. p. 161 Lines 10-20). The district court denied trial counsel's motion. (Tr. p. 162 Lines 1-9). While the prospective juror did not ultimately end up on the final jury, both remained on the jury panel and trial counsel was forced to use a peremptory strike to remove the juror from the panel. (Panel Selection Report) (App. pp. 7-15). The district court erred in overruling trial counsel's for-cause challenges to this juror, and this Court should hold that under these circumstances, prejudice is presumed and that Stephen Jonas should receive a new trial.

Iowa Rule of Criminal Procedure 2.18 (2015) generally details the process of selecting prospective jurors from the jury panel during voir dire. Specifically, Rule 2.18(5)(k) provides

that a prospective juror may be struck for cause when it appears a prospective juror has "formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial."

In State v. Neuendorf, the Iowa Supreme Court overturned decades of precedent in declaring that "[p]rejudice will no longer be presumed from the fact that the defendant has been forced to waste a peremptory challenge." Neuendorf, 509 N.W.2d 743, 747 (Iowa 1993). In so doing, the court overruled State v. Beckwith, 46 N.W.2d 20 (Iowa 1951) and State v. Reed, 208 N.W. 308 (Iowa 1926). See State v. Mootz, 808 N.W.2d 207, 226 (Iowa 2012)(Wiggins, J., concurring specially).

Here, the district court should have sustained trial counsel's for-cause challenge and Jonas requests that this Court overrule Neuendorf. The Court should find that the district court's abuse of discretion in overruling trial counsel's challenges caused structural error resulting in presumptive

prejudice because trial counsel was forced to excuse these jurors through the use of peremptory strikes.

"[T]he district court is vested with broad discretion" in ruling on for-cause challenges under Iowa Rule of Criminal Procedure 2.18(5)(k). Tillman, 514 N.W.2d at 107. Rather, the jury-selection process, and the use of for-cause challenges, is relied on to root out any specific prejudice that may arise from such publicity. Id.; State v. Wagner, 410 N.W.2d 207, 211 (Iowa 1987).

During individual voir dire, the following examination occurred:

> THE COURT: Good morning, Mr. Stagner. Go ahead and have a seat.
>
> . . .
>
> (Voir Dire by the State)
>
> Q. it is a murder case. You think if you are selected as a juror you would be fair and impartial?
>
> A. I would try to be fair and impartial.
>
> Q. And I notice on question 17, it's about the defendant in this case being gay, would this influence your ability to be fair and impartial? You understand he's not being prosecuted because he's gay?

A. Oh, I understand that, yes.

Q. So do you think you could listen to the evidence and make that decision based on the evidence and the Court's instructions?

A. I could, yes, yes.

Q. Okay. Because we don't want decisions made on anything other than that evidence that comes in from the witness stand and, you know, following the Court's instructions. So you could do that; is that right?

A. I think so, yes.

. . .

(Voir Dire by Defendant)

Q. In this case you have already been informed that Mr. Jonas identifies as gay.

A. Uh-huh.

Q. Do you understand?

A. Yes, sir.

Q. Now, in answer to No. 17, question No. 17, you were asked when you were informed that the defendant was gay – the specific question is, would this in any way affect your ability to be fair and impartial if you were selected? And you said yes. You agree that fact is going to affect your ability to be fair?

A. Somewhere in the back of my mind something would come up. I just – I'm just being honest with you, yes.

Q. No, that's what we want and we appreciate it, because we want to find jurors that are qualified for this case. And you may be an excellent juror for any other case, but you may not be the right type of juror for this case. Do you understand?

A. Yes, sir.

Q. And that's what we are trying to find out. So is it fair to say that you are not going to be able to give Mr. Jonas a fair trial because of that?

A. I would say that young man would probably do better without me on the jury, just to be honest with you. I would try to be fair. I'm 50 years old and I would try to be fair, but he probably would have better jury selection than myself.

Q. Because is that a factor you will not be able to exclude?

A. I don't know if I would be able to. I would try to exclude it, but you know somewhere in the back something is going to come up. I guess.

Q. So if I can restate what you told us, it would not be fair to Mr. Jonas to have you in the jury –

A. Correct –

Q. – because of the fact you could not be completely fair and impartial?

A. It would come – yes, yes.

MR. RODRIGUEZ: I don't have any other questions.

VOIR DIRE EXAMINATION

BY MR. SARCONE:

Q. Are you telling me you couldn't listen to the circumstantial evidence and make a decision based on the evidence?

A. Again, I would sit there and somewhere along the way something would come up in the back of my mind. I will try. Honestly I will try that, but the young man would probably do better with someone else.

Q. Have you formed an opinion now as guilt or innocence?

A. I have not, no, sir.

Q. And, you know, you have served on a jury before. You know that the State has the burden of proof and that you're supposed to make your decisions based solely on the evidence and the judge's instructions. I'm just saying, can you do that? I know you have personal feelings. Can you set those aside and make a decision based on that?

A. Again, I would try, but I'm sure there would be something that would come up.

Q. You don't know what that would be?

A. Yeah. I – again I'm 50 years old. I work with truckers and guys in oil refineries and in oil wells. It's just permeated in my life. So I will try to be honest and fair, but again, there would be something that would come up. I'm just being honest.

MR. SARCONE: I don't have any other questions.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. When you say there is going to be something that comes up, what do you mean by that?

A. You know, in the back of my mind, and I don't want to insult anybody here, I just would – I don't know. I would think I will try to be honest, but then again I would like, oh, well. And I can't explain it exactly.

Q. My questions for you is this: Does the fact that the defendant, Mr. Jonas, has identified himself as a gay man, does that fact alone cause you to be biased or prejudice against him in determining whether or not he's guilty or innocent in this case?

A. Again, I don't think it would be determined whether he was guilty or innocent, but I would still have a bias there some place, yes.

Q. Okay. So are you – if I instruct you as to what the law is, are you going to be able to follow what the law says?

A. Yes.

Q. Are you – does the fact that the defendant, again, is gay, does that cause you to not be able to listen to the evidence and keep an open mind with respect to the guilty or not guilty, the facts of this case? Do you understand the question? That was a little bit –

A. I understand that, you know, again the facts are going to be the facts and my – and that's what we will hear

and that's what we will determine. But, again, somewhere down in the –

Q. Well, the law doesn't require that you forget the fact that Mr. Jonas is gay, so that's why I'm concerned about the fact that you are telling us that there is something that might pop up in the back of your head. You don't have to forget the fact that he has identified as being gay.

Is that what you are telling the Court is that you are not going to be able to forget the fact that he's gay. Or do you think that the fact he's gay means that more likely than not that he – that you are not going to be able to give him a fair trial.

A. I think, again, the gentleman would probably do better without me on the jury. I think there could be something in the back of my mind that would – again, I'd listen to the facts. I would try my best, but it's who we are.

THE COURT: Okay. All right. Mr. Sarcone, any additional questions?

MR. SARCONE: No, Your Honor.

THE COURT: Mr. Rodriguez?

MR. RODRIGUIZ: Yes.

VOIR DIRE EXAMINATION

BY MR. RODRIGUIZ

Q. Mr. Stagner, is this – there will be this bias in the back of your mind?

A. I think there will be, yes, sir.

Q. And will it be stronger if you hear evidence of a sexual advance or something of that nature?

MR. SARCONE: Excuse me, Your Honor. I don't think that's a proper question for this witness.

THE COURT: Please rephrase your question.

Q. (By Mr. Rodriguez) Just hypothetically, does that bother you when there's a gay man approaching another?

A. Yes.

Q. Okay. And that's something that would affect your ability to be fair and impartial?

A. Again, it would bother me, yes.

. . .

THE COURT: Any—

MR. SARCONE: No, I think it's like the other witness, the one lady that sat here and said she's probably hold us to a higher standard or whatever. He may be better if without him, but that isn't a ground to excuse his as a juror at this point. I think there was a personal opinion, and then there is what the evidence is that's going to be presented, and following your instructions, and I think he would try to do that, Your Honor. I don't think there is a basis to get rid of him at this point.

MR. RODRIGUIZ: Judge, there is no question that this juror cannot be fair and impartial to Mr. Jonas because he is gay. He asserted that several times. And regardless of how he tried to rehabilitate him, the bottom

line is that in the back of his mind he' always going to note – hold that against Mr. Jonas, the fact that he's gay. That disqualifies him as a juror in this case because he cannot be fair and impartial. It wouldn't be any different if we were trying a black person and he came and said racist comments with respect to black people.

THE COURT: Anything further?

MR. SARCONE: Pardon me?

THE COURT: Anything—

MR. SARCONE: No. He's no different than the other juror we had in here earlier.

THE COURT: Well, my problem is he has said that he's going to have it in the back of his mind and that the defendant would be better off not having him as a juror. After he said that, he still continues to express the opinion that he could be fair and unbiased and be able to try a fair case.

And I just don't think that the record is there to strike him for cause at this point. So I'm going to allow Mr. Stagner to stay on the panel.

(Tr. p. 149 Line 8 – p. 162 Line 9).

Critics have found that rehabilitation only goes so far; jurors, wanting to please the tribunal when being questioned feverishly by two lawyers and a judge, are not the best predictors of their own impartiality. See Mary R. Rose & Shari Seidman Diamond, Judging Bias: Juror Confidence and

Judicial Rulings on Challenges for Cause [hereinafter "Judging Bias"], 42 Law & Soc'y Rev. 513, 516 (Sept. 2008)("The context of voir dire provides several reasons to be concerned about the quality of jurors' claims of fairness. For one thing, by design, voir dire questions often convey social desirability; that is, the questions suggest that it is 'better' to answer one way than another. . . . [I]ndividuals recognize that fairness is a desirable characteristic, and most people want to believe that they possess it."); Shari Seidman Diamond et al., Realistic Responses to the Limitations of Batson v. Kentucky, 7 Cornell J.L. & Pub. Pol'y 77, 92 (1997)("People are often unable to recognize the extent to which their experiences or attitudes affect their judgments."); Dov Fox, Neuro-Voir Dire and the Architecture of Bias, 65 Hastings L.J. 999, 1011 (2014) ("[S]imply asking jurors whether they can be impartial is not likely to reveal with any reliability the presence or strength of many of the outside influences that they would in fact bring to bear on the questions at trial."); Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The

Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 160 (2010) ("As a [federal] district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can 'be fair.'"); Kurt F. Ellison, Comment, Getting Out of the Funk: How Wisconsin Courts Can Protect Against the Threat to Impartial Jury Trials, 96 Marq. L. Rev. 953, 979 (2013)("[J]urors' statements of impartiality are often motivated by pressure from the judge . . . ."). Furthermore, judges may be more likely to be convinced by jurors who confidently claim they are impartial. Judging Bias, 42 Law & Soc'y Rev. at 534–35.

2. *This Court should overrule State v. Neuendorf and hold that prejudice is presumed when trial counsel is forced to exercise a peremptory strike on a juror who should have been struck for cause.*

If the Court finds that the district court abused its discretion in overruling trial counsel's for-cause challenge, then Jonas respectfully requests that this court overrule State v.

Neuendorf and find that, under Iowa Rule of Criminal Procedure 2.18(5) and (9), this constitutes structural error, prejudice is presumed, and reversal is required.

a. *The problematic Neuendorf standard*

Under current Iowa law, to show prejudice resulting from the overruling of a for-cause challenge, a criminal defendant must show "(1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the defendant's use of all of the peremptory challenges." Tillman, 514 N.W.2d 108. Because trial counsel ultimately struck the challenged juror through a peremptory strike, the jurors did not serve on the actual jury. Therefore, under the Neuendorf standard, Royer cannot show prejudice.

Iowa Rule of Criminal Procedure 2.18(9) provides that both the State and the defense are entitled to ten peremptory strikes in a trial for a Class A felony. In 1926, the Iowa Supreme Court in State v. Reed declared that where a prospective juror is "clearly disqualified" from serving in the case at issue, but who

is not struck for cause, "[t]he error is not cured by reason of the fact that [the defendant] exercised his peremptory challenge against the juror." Reed, 208 N.W. 308, 309 (Iowa 1926), *overruled by* Neuendorf, 509 N.W.2d at 747, *as stated in* Mootz, 808 N.W.2d at 222. Nearly thirty years later, the Iowa Supreme Court reaffirmed this principle in State v. Beckwith, declaring that a "[d]efendant should not be compelled to use his peremptory challenges upon prospective jurors who should have been excused for cause." Beckwith, 46 N.W.2d 20, 23 (Iowa 1951), *overruled by* Neuendorf, 509 N.W.2d at 74.

In 1993, the Iowa Supreme Court abruptly changed course on the issue of presumed prejudice due to the district court's erroneous overruling of a for-cause challenge. In Neuendorf, the court found that the district court erred in overruling defense counsel's for-cause challenge to a juror who had a preconceived notion about the case and whose bias was not cured through rehabilitation by the court. Neuendorf, 509 N.W.2d at 745–46. The Neuendorf court, however, dispensed with the longstanding rule that prejudice is presumed when

trial counsel is forced to use peremptory strikes on jurors who should have been struck for cause. Neuendorf, 509 N.W.2d at 746–47. The Neuendorf decision was grounded in the fact that because the challenged juror ultimately did not serve on the defendant's jury, the existence of prejudice was "too speculative to justify overturning the verdict of the jury on that basis alone." Id. at 746. Importantly, the court's decision did not explicitly rest in any constitutional or rule-based principle; the court appeared to simply be following a trend in the law, and recognized that its decision was not unconstitutional under federal law. Id. at 746–47.

The Neuendorf standard, however, mischaracterizes the purpose of peremptory challenges. The Neuendorf test is based on the lack of a violation of the federal Sixth and Fourteenth Amendment right to an impartial jury, evidenced by its insistence on a finding of actual juror bias to warrant reversal. See Neuendorf, 509 N.W.2d at 746–47. An impartial jury, however, is not the only harm caused by such a rule; the Neuendorf court completely ignored the imbalance in favor of

the State caused by the denial of meritorious strikes for cause and requiring defense counsel to needlessly exhaust its limited peremptory strikes under Rule 2.18(9) to cure an error of the district court. These are two distinct harms, only one of which is addressed by the Neuendorf test.

Peremptory strikes are never meant to be used to ensure that biased jurors do not end up on a jury; for-cause challenges instead serve that purpose. Rather, peremptory strikes enable both sides to strike jurors whose biases, prejudices, outlooks on life, or any other non-discriminatory reasons do *not* necessarily require elimination, but who the challenging party believes should nonetheless be struck. See Shane v. Com., 243 S.W.3d 336, 339 (Ky. 2007)("By their very nature, peremptory challenges are not for cause; they can be for any reason whatsoever, except that the juror is a member of a protected class."). But requiring a defendant to bear the burden of curing the errors of the district court effectively reduces the number of peremptory strikes available to the defense. See id. ("To shortchange a defendant in this manner is to effectively

give the Commonwealth more peremptory challenges than the defendant."); see also The Supreme Court, 2008 Term – Leading Cases, Peremptory Challenges – Harmless Error Doctrine, 123 Harv. L. Rev. 212, 213, n. 6 (2009)(criticizing the Supreme Court for "upholding practices that effectively reduce" the number of available peremptory challenges for the defendant despite their pivotal importance to both parties in jury selection.

While Iowa courts rarely apply a plain error standard, it is necessary here where the errors "involve defects 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Feregrino, 756 N.W.2d 700, 707 (Iowa 2008)(quoting Johnson v. U.S., 520 U.S. 461, 468, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718, 728 (1997) (internal quotation marks omitted)). Where "the criminal adversary process itself is 'presumptively unreliable,'" prejudice should be presumed. Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011).

The United States Supreme Court has described structural error requiring automatic reversal as error that

"necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Washington v. Recuenco, 548 U.S. 212, 218–19, 126 S.Ct. 2546, 2551, 165 L.Ed.2d 466 (2006). Other courts have explicitly recognized that the outright denial of peremptory challenges in other contexts is structural error. See, e.g., U.S. v. McFerron, 163 F.3d 952, 956 (6th Cir. 1998) ("[W[e reject the application of harmless error analysis to the denial of a right to exercise peremptory challenges. This type of error involves a 'structural error,' which is not subject to harmless error analysis. . . . [S]tructural errors, such as the erroneous denial of a peremptory challenge, affect the entire conduct of the trial from beginning to end." (internal quotation marks omitted)). The same standard should be applied here, when the denial of peremptory challenges, though not explicit, has the same effect.

b. *This Court should overrule Neuendorf and hold that a district court's error in disallowing meritorious for-cause challenges is structural error resulting in presumptive prejudice.*

In State v. Mootz, the Iowa Supreme Court held that Rule 2.18(9) requires reversal where the district court erroneously denies a peremptory strike resulting from a reverse Batson challenge. Mootz, 808 N.W.2d at 226. In his special concurrence in Mootz, Justice Wiggins opined that forcing a defendant to utilize a peremptory strike where a for-cause challenge should have undoubtedly been sustained *always* results in prejudice, and suggests that this Court do away with the unduly burdensome Neuendorf rule. Mootz, 808 N.W.2d at 226 (Wiggins, J., concurring specially). Justice Wiggins concluded that the "logical extension" of finding error where a district court allows a juror to remain on the jury panel who should have been struck is to presume prejudice, and stated that Neuendorf was wrongly decided. Id.

Notably, other courts, including the United States Supreme Court interpreting and applying federal law in this context, have disagreed. In U.S. v. Martinez-Salazar, the United State Supreme Court made clear that, under federal law, "if the defendant elects to cure such an error by exercising a

peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." Martinez-Salazar, 528 U.S. 304, 307, 120 S.Ct. 774, 777, 145 L.Ed.2d 792 (2000).

However, this Court is under no duty to track federal law on issues raised under Iowa law, and may in fact agree with many states that have rejected the Supreme Court's standard on state-law grounds. See, e.g., Busby v. State, 894 So.2d 88, 103 (Fla. 2004) ("[T]he curative use of a peremptory challenge violates a defendant's right to a trial by impartial jury when that defendant can show that he or she went without the peremptories needed to strike a seated juror.")[1]; Johnson v. State, 43 S.W.3d 1, 5–7 (Ct. Crim. App. Tex. 2001)(rejecting Ross on state law grounds); State v. Ball, 824 So.2d 1089, 1102, n. 9 (La. 2002)(reiterating that "[p]rejudice is presumed by a

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[1] Importantly, the Busby court did not require a showing that a biased juror was actually seated on the final panel, disagreeing with Ross v. Oklahoma, 487 U.S. 81, 109 S.Ct. 2273, 101 L.Ed.2d 80 (1988); rather, it was enough that the defendant was forced to use a "curative" peremptory strike that deprived him of an additional strike he would have used otherwise. See Busby, 894 So.2d at 103.

trial judge when a challenge for cause is denied erroneously by a trial court and the defendant ultimately exhausts his peremptory challenges," and recognizing its divergence from the federal rule.); State v. Taylor, 875 So.2d 58, 62 (La. 2004) ("Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges. An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error." (internal citations omitted)); Fortson v. State, 587 S.E.2d 39, 41 (Ga. 2003)("[T]his Court has recognized that causing a defendant to unnecessarily use a peremptory strike on a juror that should have been excused for cause is per se harmful error."); Green, 652 N.E.2d at 776 ("[T]he erroneous disallowance of a peremptory challenge is reversible error without a showing of prejudice.").

In the 1993 case Thomas v. Com., the Kentucky Supreme Court held that prejudice was presumed and reversal was mandatory when the defendant was forced to use a peremptory strike on a juror that should have been struck for cause,

concluding that the defendant was ultimately deprived of his ability to exercise all of his peremptory challenges. Thomas, 864 S.W.2d 252, 260 (Ky. 1993), *overruled by* Morgan v. Com., 189 S.W.3d 99 (Ky. 2006), *overruled by* Shane v. Com., 243 S.W.3d 336 (Ky. 2007). Not long after, in 2006, the Kentucky Supreme Court, similarly to our court in Neuendorf, reversed course, overruled Thomas, and adopted a harmless-error test under these circumstances because the challenged juror did not end up on the actual jury, concluding that reversal on this principal alone "would be absurd." Morgan, 189 S.W.3d at 107, *overruled by* Shane, 243 S.W.3d 336.

One year later, in 2007, the Kentucky Supreme Court recognized its error and quickly reversed course yet again, returning to the Thomas standard and overruling Morgan. Shane, 243 S.W.3d at 341. The Shane court reasoned that "[w]hen a juror is not properly struck for cause, without peremptory strikes, a defendant would find himself forced into an unfair trial. The substantial nature of a peremptory strike is thus obvious in this context." Id. The Shane court, in quite

simple terms, identified the fundamental unfairness and inequity inherent applying a harmless-error analysis in this context:

> Here, the defendant was tried by a jury that was obtained by forcing him to forgo a different peremptory strike he was entitled to make. If he had been allowed that strike, he may well have struck one of the jurors who actually sat on the jury. He came into the trial expecting to be able to remove jurors that made him uncomfortable in any way except in violation of Batson v. Kentucky; this was a right given to him by law and rule. Depriving him of that right so taints the equity of the proceedings that no jury selected from that venire could result in a fair trial. No jury so obtained can be presumed to be a fair one.

Id. at 340.

CONCLUSION

Royer respectfully requests that the Court vacate his sentence, reverse his conviction for Murder in the Second Degree, and remand this case to the district court for retrial.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $4.44, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

ROBERT P. RANSCHAU
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,082 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: 3/13/17

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IN THE COURT OF APPEALS OF IOWA

No. 15-1560
Filed February 22, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEPHEN ROBERT JONAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Paul D. Scott, Judge.

The defendant appeals from his conviction for murder in the second degree, claiming the trial court erred in overruling his motion to strike a potential juror for cause, sufficient evidence to support the conviction did not exist, and his counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Linda J. Hines, Assistant Attorney General, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, Judge.

Stephen Jonas appeals from his conviction for murder in the second degree as a lesser included offense of murder in the first degree. He asserts the trial court erred in overruling his motion to strike a potential juror for cause, there was insufficient evidence to support the conviction, and his counsel was ineffective for failing to object to statements made by the prosecutor during closing arguments. He also claims counsel was ineffective for failing to request a limiting instruction regarding another statement made during the prosecutor's closing argument. We affirm.

I. Background Facts and Proceedings

On August 23, 2014, Zachery Paulson was found dead in the lot of his father's business (the lot) bordering the Clive Greenbelt Trail. Following an autopsy, it was determined that the victim died from approximately thirty-five stab and incised wounds.[1] At the scene, the police discovered a ball-peen hammer and a cell phone belonging to the victim.

Shortly after the discovery of the body, the police contacted Jonas at his residence, and he voluntarily went to the police station to answer questions. Jonas's statements to the police and at trial became a central aspect of the prosecution's case.

During his first interview with the police, Jonas stated several times he was not involved and did not know anything about the victim's death. He also stated multiple times he was never at the scene where the victim's body was

[1] According to expert testimony, a stab wound is deeper than it is wide, while an incised wound is the opposite.

discovered. At no time during the first police interview did Jonas state that the victim struck him or that he was defending himself. In fact, he stated the large circular bruise on his chin was caused by tripping and falling on the concrete.

Following the interview, the police inspected Jonas's truck and asked questions about a stain in the truck the police believed was blood. In response, Jonas claimed the stain was chocolate or possibly blood from one of his children's injuries.[2] Jonas continued to deny involvement in, or knowledge about, the victim's death, even after the police gave him multiple opportunities to change his story. Jonas returned home.

That night, the police asked Jonas to come back to the station to answer more questions. Jonas complied. Initially, Jonas continued to state that he had no additional information. During the second interview, however, his story changed. When he was confronted with video evidence showing his truck near the scene, Jonas admitted to stabbing the victim but said he did so in self-defense.

At trial, Jonas testified that his encounter with the victim on the night of his death was not the first time he met the victim. Jonas and the victim were both regulars at a local bar and had been at the lot together an earlier time. Approximately one week before the victim's death, Jonas went to the lot with the victim and another acquaintance to drink some beers after the bars closed. As the parties were leaving, Jonas described physical contact with the victim. According to Jonas, he engaged in a mutual hug with the victim that led to

[2] Later testing confirmed the stain was blood matching the DNA of the victim.

kissing.[3] Jonas continued to contact the victim via text message throughout the next week. The text messages went unanswered.

According to Jonas's testimony, on August 22, 2016—the night of the victim's death—Jonas went to the local bar in an attempt to confront the victim about the events that took place at the lot earlier that week. The victim acknowledged him, but no meaningful conversation took place. After the bar closed, Jonas decided to drive to the lot in order to "speak with [the victim] about what had happened the previous week" and "find out what he was thinking." Jonas testified that when he arrived at the lot, he offered the victim a drink and they engaged in casual conversation for a brief time. Shortly after, Jonas suggested they both go outside to smoke a cigarette. According to his testimony, as Jonas went to his car to get his cigarettes, he noticed the victim putting a hammer in his pocket. While he was getting his cigarettes, Jonas pocketed a knife from his car. He then walked to the back of the lot to meet the victim. Jonas claimed that as he approached, the victim struck him in the chin with the hammer and a fight ensued. Jonas told the police he remembered stabbing the victim only five times. The victim was moaning when Jonas left the scene and eventually died from the wounds.

According to expert testimony, the victim suffered twenty-two stab wounds and fifteen incised wounds before he died. The most significant wounds included a stab wound to the left eye penetrating into the globe of the eye, a stab wound to the abdomen, a stab wound into the chest cavity and lung, and a deep incised

[3] Other prosecution witnesses testified the victim described the contact as unwanted; the victim pushed Jonas away and asked him to leave.

wound between the right thumb and index finger that nearly severed the thumb. The wound to the thumb was consistent with a defensive wound where the victim likely grabbed the knife. According to expert testimony, the victim could have lived for five to fifteen minutes after the struggle ended.

On September 30, 2014, Jonas was charged by trial information with murder in the first degree. Jonas filed a notice of defense of justification. The trial began on July 2, 2015.

A written questionnaire asked each potential juror to indicate whether they would be prejudiced against Jonas because he identified himself as a gay man. During voir dire, Jonas's trial counsel challenged a potential juror for cause based in part on the juror's affirmative answer to the questionnaire; counsel argued the juror's prejudice against Jonas's sexuality prevented the juror from being fair and impartial. After counsel's request to strike the juror for cause, the court and the potential juror had the following exchange:

> Q. My questions for you is this: Does the fact that the defendant, Mr. Jonas, has identified himself as a gay man, does that fact alone cause you to be biased or prejudice against him in determining whether or not he's guilty or innocent in this case? A. Again, I don't think it would be determined whether he was guilty or innocent, but I would still have a bias there some place, yes.
>
> Q. Okay. So are you—if I instruct you as to what the law is, are you going to be able to follow what the law says? A. Yes.

After hearing arguments from both sides regarding the potential juror, the court made the following ruling:

> Well, my problem is he has said that he's going to have it in the back of his mind and that the defendant would be better off not having him as a juror. After he said that, he still continues to express the opinion that he could be fair and unbiased and be able to try a fair case.

> And I just don't think that the record is there to strike him for cause at this point. So I'm going to allow [the juror] to stay on the panel.

The juror was allowed to stay on the panel until defense counsel used a peremptory strike to remove the juror.

The jury returned a verdict of guilty for murder in the second degree. Jonas was sentenced to serve an indeterminate term of imprisonment not to exceed fifty years. The sentence includes a seventy percent mandatory minimum before Jonas is eligible for parole, and $150,000 in restitution to the victim's estate.

Jonas appeals the conviction and the sentence.

II. Standard of Review

We review the district court's rulings on for-cause challenges to prospective jurors for an abuse of discretion. *State v. Tillman*, 514 N.W.2d 105, 107 (Iowa 1994). "In ruling on a challenge for cause, the district court is vested with broad discretion." *Id.*

We review challenges to sufficiency of the evidence for correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

We review claims of ineffective assistance de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

III. Discussion

A. Defendant's Challenge for Cause.

Jonas maintains the district court erred in overruling his motion to strike a potential juror for cause. Iowa Rule of Criminal Procedure 2.18(5)(k) allows a party to challenge a prospective juror if the juror "form[s] or expresse[s] such an

opinion as to the guilt or innocence of the defendant [that] would prevent the juror from rendering a true verdict upon the evidence submitted on the trial." The trial court is vested with broad discretion when ruling on a challenge for cause. *Tillman*, 514 N.W.2d at 107. In order to overcome the court's ruling, "the defendant must show (1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the defendant's use of all of the peremptory challenges." *Id.* at 108; *see also State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993) ("In the absence of some factual showing that this circumstance resulted in a juror being seated who was not impartial, the existence of prejudice is entirely speculative.").

Jonas contends the court's ruling on the challenge was an abuse of discretion but does not argue the remaining jurors were prejudiced against him. The challenged juror did not serve on the jury. We decline to reach the merits of the court's denial of the challenge for cause since Jonas's claim does not meet the requirements of *Neuendorf*.[4] 509 N.W.2d at 746. Jonas did not challenge

[4] We note the juror never stated he could overcome his admitted bias, despite the court's efforts to rehabilitate him. The potential juror's last statement confirmed Jonas's sexuality would affect his ability to be fair and impartial: "Q. And [Jonas's sexuality] would affect your ability to be fair and impartial? A. Again, it would bother me, yes."

We are skeptical of rehabilitative efforts in these situations to remove deeply held prejudices. The voir dire setting alone invites a false sense of fairness by suggesting to the potential juror that acceptance of the rehabilitative efforts is socially desirable, despite their deeply held prejudices. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 160 (2010) ("As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can 'be fair.'"); Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 Law

any of the remaining jurors on the panel for cause. *See Tillman*, 514 N.W.2d at 108 ("A lack of apparent prejudice is suggested by the fact that [the defendant] did not even challenge the members of the panel that were actually seated as jurors."). Jonas claims prejudice is automatic when a defendant is forced to use a peremptory strike on a juror challenged for cause, but our law does not support his claim. "[P]artiality of a juror may not be made the basis for reversal in instances in which that juror has been removed through exercise of a peremptory challenge." *Neuendorf*, 509 N.W.2d at 747. Despite Jonas's arguments against the *Neuendorf* requirement, "[w]e are not at liberty to overturn Iowa Supreme Court precedent." *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990). We affirm the district court's ruling on Jonas's motion to strike for cause.

B. Sufficiency of the Evidence.

1. Justification Defense. Jonas argues the State failed to prove beyond a reasonable doubt that he did not act with justification. "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself . . . from any imminent use of unlawful force." Iowa Code § 704.3 (2014). When a defendant raises justification as a defense, the State is required to prove the absence of justification. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006). To prove the absence of justification, the

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& Soc'y Rev. 513, 516 (2008) ("[I]ndividuals recognize that fairness is a desirable characteristic, and most people want to believe that they possess it.").

In this case, the juror stated that he could follow the judge's instructions while simultaneously acknowledging that his bias would affect his fairness, a contradiction that illustrates the difficulty of rehabilitative efforts. Still, the requirements of *Neuendorf* prevent us from finding error without the requisite prejudice. 509 N.W.2d at 746 ("In the absence of some factual showing that this circumstance resulted in a juror being seated who was not impartial, the existence of prejudice is entirely speculative.").

State must establish, beyond a reasonable doubt, any one of the following elements:

> 1. The defendant initiated or continued the incident resulting in injury;
> 2. An alternative course of action was available to the defendant;
> 3. The defendant did not believe he was in imminent danger of death or injury and that the use of force was not necessary to save him;
> 4. The defendant had no reasonable grounds for such belief; or
> 5. The force used was unreasonable.

Shanahan, 712 N.W.2d at 134; *see also* Iowa Code § 704.3.

In assessing the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Showens*, 845 N.W.2d 436, 439-40 (Iowa 2014). "We will uphold a verdict if substantial record evidence supports it." *Id.* (citation omitted). "If the evidence could convince a rational trier of fact the defendant is guilty of the charged crime beyond a reasonable doubt, it is substantial." *Shanahan*, 712 N.W.2d at 134. "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

Generally, a jury can rationally dismiss a self-defense claim when testimony is unbelievable or the evidence contradicts the elements of self-defense. In *Thornton*, for example, a defendant charged with first-degree murder claimed that he shot the victim in self-defense after the victim lunged at him with a knife. 498 N.W.2d at 672. In support of his claim, the defendant argued that he could not retreat because the events took place in a crowded room. *Id.* The

defendant, however, was able to leave the room immediately after the shooting. *Id.* at 673. The defendant also suffered no injuries, failed to call an ambulance, and did not call the police until the following day. *Id.* Our supreme court held, "[T]he jury could rationally believe these were not the actions of someone who honestly believed he acted in self-defense." *Id.* at 673–74.

We believe the jury in the present case could also rationally conclude that Jonas's actions surrounding the victim's death were consistent with the actions of someone who was able to retreat, or someone who continued the incident after the threat ended. *Id.* Examining the parties' injuries based on expert testimony suggests an alternative course of action was available to Jonas or he continued the incident unnecessarily. While Jonas did suffer some injuries, a reasonable jury could infer the approximate thirty-five stab and incised wounds suffered by the victim compared to Jonas's bruises were inconsistent with the absence of a an alternative course. In fact, Jonas sliced through the web between the victim's thumb and index finger nearly severing the victim's thumb, which rendered the victim's dominant hand useless. It was rational to conclude Jonas failed to retreat or continued the incident after the threat ceased, which satisfies the State's burden.

The *Thornton* court further explained a jury could rationally disbelieve a defendant's testimony that was inconsistent, uncorroborated, contradictory, and contrary to the actions of someone who was acting in self-defense. *Id.* at 673 ("Although [the defendant] claimed to be unable to retreat from the bar when [the victim] allegedly lunged, [the defendant] was able to easily leave the house without speaking to anyone immediately after the shooting. No other witnesses

saw [the victim] lunging or holding a knife; one witness even testified [the victim's] hands were at his side when [the defendant] shot him. The State presented evidence the knife may have simply fallen from the bar when the police moved the bar to get close to [the victim]."). We believe the jury in the present case could rationally choose to disbelieve Jonas's testimony. First, he admitted at trial that he was dishonest with the police, which undermined his credibility.[5] Second, Jonas's testimony was inconsistent and contradictory. Following the victim's death, for example, a witness stated that Jonas was seen throwing away garbage at the witness's apartment complex. However, Jonas claimed he "never" went to the dumpster and "it's all a figment of [the witness's] imagination."[6] Another witness claimed the victim described the first physical encounter with Jonas as unwanted to the point that the victim pushed Jonas away. Jonas claimed the victim never pushed him away and stated, "[The witness] just made that up."

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[5] The following exchange took place between the prosecutor and the defendant:

> Q. [Y]ou are talking to [the police]. And when they ask you if you've been out with these guys or anywhere else or any other time, you say, "Never." A. As the record has stated and I have said, I was not completely forthright on the first [police] interview.
>
> Q. And so your answer is you weren't truthful with [the police]; right? A. I was not completely forthright.
>
> Q. And when they ask you about having phone numbers for either [the witness] or the victim, you tell them no, you didn't; right? A. I was not completely forthright.

[6] Before Jonas testified, the witness described Jonas's action the day following the murder: "I could see [Jonas] parked over across from the dumpsters, where he normally parked, and just throwing some stuff away."

During cross-examination, Jonas denied the witness's testimony:

> Q. And so you weren't down by the dumpster at all . . . A. No, I was not.
>
> Q. Never? A. Never.
>
> Q. So it's just all a figment of [the witness's] imagination? A. It's all a figment of [the witness's] imagination.

Jonas's actions were also inconsistent with someone who was acting in self-defense. Like the defendant in *Thornton*, Jonas did not call an ambulance after he left the scene even though he knew the victim was alive. *Id.* Jonas avoided the police by failing to initiate any contact with them and by lying to them throughout the initial interviews. Jonas also testified that after the incident, he took a shower and went to sleep instead of alerting authorities about the wounded victim, who was still moaning when Jonas left the scene. Before his police contact, Jonas disposed of his weapon by throwing it over a bridge into the river, and he disposed of his clothes by throwing them into a field. Based on the above, a reasonable jury could conclude the State met its burden in overcoming Jonas's self-defense claim. *Id.*

2. Murder-in-the-Second-Degree Conviction. Jonas argues the evidence was insufficient to support a conviction of murder in the second degree. Murder in the second degree has two elements: (1) a person kills another person; and (2) the killing is done with malice aforethought. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010); *see also* Iowa Code § 707.1 ("A person who kills another person with malice aforethought either express or implied commits murder."); Iowa Code § 707.3 ("A person commits murder in the second degree when the person commits murder which is not murder in the first degree."). "Malice aforethought requires the actor to have 'a fixed purpose or design to do physical harm to another that exists before the act is committed.'" *State v. Tyler*, 873 N.W.2d 741, 751 (Iowa 2016) (citation omitted). Because Jonas admitted to

stabbing the victim with a knife, a dangerous weapon,[7] which led to his death, the jury was instructed they could infer malice from that fact. *See State v. Hahn*, 259 N.W.2d 753, 758–59 (Iowa 1977) (stating a jury may infer malice aforethought when the defendant uses a deadly weapon); *see also Shanahan*, 712 N.W.2d at 135 (holding the defendant's use of a deadly weapon supports the inference of malice aforethought). Consequently, the jury could conclude Jonas's actions supported the malice element of second-degree murder.

C. Ineffective Assistance of Counsel.

Jonas maintains trial counsel failed to object to prosecutorial misconduct[8] during the State's closing argument, and trial counsel failed to ask for a limiting instruction following an apparently sustained objection to another part of the prosecutor's closing argument. Specifically, Jonas argues the State made impermissible disparaging comments about Jonas's credibility. Jonas also

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[7] "A 'dangerous weapon' is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed . . . ." Iowa Code § 702.7. Jonas does not contest that the knife used was a dangerous weapon.

[8] In a recent case, the Iowa Supreme Court cautioned against conflating the terms prosecutorial misconduct, which generally describes "those statements 'where a prosecutor intentionally violates a clear and unambiguous obligation or standard imposed by law, applicable rule or professional conduct' as well as 'those situations where a prosecutor recklessly disregards a duty to comply with an obligation or standard,'" and prosecutorial error, which includes situations "'[w]here the prosecutor exercises poor judgment' and 'where the attorney has made a mistake' based on 'excusable human error, despite the attorney's use of reasonable care.'" *State v. Schlitter*, 881 N.W.2d 380, 394 (Iowa 2016) (citations omitted).

We use the term prosecutorial misconduct throughout, as both Jonas and the State did in their appellate briefs. We note that we are to apply the multi-factor test outlined in *State v. Graves*, 668 N.W.2d 860, 877–78 (Iowa 2003), either way. *See Schlitter*, N.W2d at 394. (stating the multifactor test set out to evaluate the statements in determining if there was misconduct and if that was misconduct was prejudicial "easily translate to an evaluation of prosecutorial error").

argues defense counsel failed to request a limiting instruction after the State asked the jury to "send a message that you can't kill someone like this."[9]

To succeed on an ineffective-assistance-of-counsel claim based on prosecutorial misconduct, a defendant must establish: (1) proof of misconduct; and (2) "the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial." *Graves*, 668 N.W.2d at 869. "A defendant's inability to prove either element is fatal." *See id.*

We turn to the prejudice element first. In his claim, Jonas is required to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006). In deciding prejudice, we analyze the following factors: "(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct." *Graves*, 668 N.W.2d at 877. "The most important factor under the test for prejudice is the strength of the State's case." *Carey*, 709 N.W.2d at 559.

1. The "Credibility" Comments. During the State's closing arguments, the prosecutor stated in part, "[Jonas] is not credible," other evidence is "more credible than [Jonas]," Jonas is "making it up," and "[Jonas] is not being truthful

[9] Jonas concedes trial counsel objected to the prosecutor's statement about "send[ing] a message that you can't kill someone like this." Jonas argues trial counsel should have made a request "to the court that the jury be instructed to disregard the prosecution's statement." However, these statements did not result in unfair prejudice. Thus, we decline to address whether defense counsel failed to perform an essential duty regarding the limiting instruction.

with you about what happened down there." Under the first and second factors, misconduct regarding credibility statements that the prosecution relies on to link the defendant and the criminal conduct can demonstrate prejudice. *See, e.g.*, *Graves*, 668 N.W.2d at 877 (holding prosecutorial misconduct directed at the credibility of the defendant is extremely significant when the *only* link between the defendant and possession of a banned substance is the statement allegedly made by the defendant to the officer that he had been in possession of the banned substance). However, these circumstances are distinguishable from *Graves* because, unlike the defendant in *Graves*, Jonas testified he misled the police, which presented the issue of his credibility to the jury. Jonas's credibility was also impeached by contradictory testimony from multiple witnesses. Finally, the State submitted evidence that did not relate to Jonas's credibility in order to overcome his claim of self-defense. The prosecutor's statements regarding credibility were based on the evidence at trial and not the prosecutor's personal opinion. It is not prejudicial to attack the credibility of the defendant when the defendant admits dishonesty and calls into question the credibility of contradictory witnesses. *See Carey*, 709 N.W.2d at 560.

For similar reasons the strength of the State's case—the most important factor—was significant. This was not a case, like *Graves*, that hinged on a single admission to the police. 668 N.W.2d at 877–78 (holding the strength of the State's case is weak when the evidence outside of the defendant's statements is insufficient to support the charges). Again, the State submitted various forms of evidence that challenged Jonas's self-defense claim, including expert testimony, exhibits indicating the nature of the stab wounds, and witnesses whose testimony

contradicted Jonas's testimony. Furthermore, if the prosecutor's statements were removed, Jonas's credibility would still be in question because of his own statements and contradictory witnesses' testimony. *See Carey*, 709 N.W.2d at 560 (holding prejudice does not exist when there are severe inconsistencies in the defendant's testimony and other evidence is sufficient to overcome a justification defense).

Based on the above, there was not a reasonable probability the alleged misconduct prejudiced, inflamed, or misled the jurors so that the jury convicted Jonas for reasons outside the evidence at trial and the law within the court's instructions. *Graves*, 668 N.W.2d at 876–77.

2. The "Send a Message" Comment. During closing arguments, the prosecution, the court, and defense counsel had the following exchange:

> PROSECUTER: When he stabbed the kid—it's a no-brainer—he had the specific intent to kill. He also tried to cover it all up; you know that now. That's no justification.
>
> Once we prove that, folks—again, murder in the first degree is what we charged him with—if you are satisfied, you put another checkmark. Whether—and this verdict has to be—*send a message that you can't kill someone like this.*
>
> . . . .
>
> THE COURT: [Defense counsel] has an objection.

(Emphasis added.) Following the objection, a discussion was held at the bench, off the record. The court did not rule on the defense objection following the bench conference and gave no limiting instruction.[10] The prosecutor moved to a different subject.

> PROSECUTER: Thank you.

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[10] Jonas has not provided any record to show counsel failed to request a limiting instruction.

> Let's talk about justification, because really, that's the issue he's now raising.

A panel of our court held it is improper for a prosecutor to ask the jury to "send a message" because the statement "urge[s] the jurors to convict the defendant in order to protect community values and prevent further criminal activity." *State v. Johnson*, 534 N.W.2d 118, 127 (Iowa Ct. App. 1995). However, these statements must also be prejudicial to the extent that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Carey*, 709 N.W.2d at 559. While Jonas did not invite these comments nor was a limiting instruction given, the comment was restricted to a small portion of the lengthy trial and closing arguments. The prosecution only made the comment once, and defense counsel immediately objected to the statement. The prosecution moved on and did not mention it again throughout the closing argument. *Compare State v. Musser*, 721 N.W.2d 734, 756 (Iowa 2006) (holding objectionable statements by the prosecution are not prejudicial when "[t]he evidence against the defendant was strong, the comments did not go to a central issue in the case, and the improper statements by the prosecutor were isolated [to the opening statement and closing argument]"), *and Johnson*, 534 N.W.2d at 128 (holding improper comments that were limited to a rebuttal argument and not repeatedly presented to the jury, although improper, are not prejudicial), *with Graves*, 668 N.W.2d at 883 (holding prejudice exists when the "misconduct permeated the entire trial because it was part of a theme developed by the prosecutor"). Furthermore, the isolated statement is not significant enough to outweigh the strong evidence used to convict Jonas, as outlined

above. The alleged misconduct did not result in the requisite prejudice to warrant a new trial, and Jonas's ineffective-assistance-of-counsel claim must fail.

IV. *Conclusion*

Jonas claims the district court erred in ruling on his challenge for cause of a potential juror, substantial evidence did not exist to support a conviction, and his trial counsel was ineffective. Jonas cannot demonstrate the requisite prejudice to prevail on his claim that the court erroneously denied his challenge of a juror. Substantial evidence existed to overcome Jonas's justification defense because a reasonable jury could conclude that Jonas initiated or continued the fight or had an opportunity to retreat. Similarly, substantial evidence existed to support the malice element of second-degree murder. Finally, Jonas's counsel was not ineffective because the prosecutor's statements during closing arguments did not result in the necessary prejudice to warrant a new trial.

AFFIRMED.

State of Iowa Courts

Case Number	**Case Title**
15-1560	State v. Jonas

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